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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 807

Case No. 917: LEHMANN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 27 March 1996, Ingrid A. Lehmann, a former staff member of the United Nations, filed an application containing, inter alia, the following pleas:

"(a) That the Secretary-General's decision to terminate her permanent appointment on the ground of incapacity for further service by reasons of health was without basis and totally invalid;

(b) That the Secretary-General was well aware of the absence of proof of incapacity for further service and that his decision was arbitrary, capricious and with calculated malice;

(c) That the Secretary-General's decision was in violation of the letter and spirit of staff regulation 9.1(a) and in clear violation of personnel directive 3/80 and article 33(a) of the United Nations Joint Staff Pension Fund Regulations;

(d) That the Secretary-General's arbitrary and merciless decision resulted in her loss of employment for a least 13 more years and loss of pension accumulation for the same period, and that the autocratic and arbitrary measure of bypassing the Pension Fund Committee has wantonly and irresponsibly deprived the Applicant of a

disability benefit payable to staff members who are genuinely incapacitated for further service;

(e) That the Secretary-General should rescind the termination of the Applicant and reinstate her in the position in which she was at the time of the purported separation;

(f) That such reinstatement should automatically restore all her rights and entitlements as a staff member, including health insurance coverage retroactively to the date of purported separation and the right to sick leave in accordance with staff rule 106.2;

(g) That, should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations to pay compensation in lieu of specific performance, the Applicant prays that the Tribunal order an amount of compensation that would take into account the loss of salary, including the pension factor, loss of sick leave on full pay and sick leave on half pay under article 106.2(iv) of the Staff Rules (i.e. 9+9 months), and loss of disability benefit effective the date of separation;

(h) That this be considered an exceptional case justifying the payment of higher indemnity under article 9.1 of the Statute of the Administrative Tribunal, for the following reasons:

(i) ... [the] Under-Secretary-General for Administration and Management [USG/A&M] wrote to the Applicant on 1 March 1995 advising her of the termination decision 'effective immediately'.

(ii) In his capacity as USG/A&M and with the availability of high calibre legal advice, he knew or should have known that his decision was arbitrary and totally devoid of any legitimate or legal basis.

(iii) The deliberate circumvention of the Pension Fund Committee by the USG/A&M because of full knowledge that the case did not meet the criteria for termination for incapacity by reasons of health is a clear indication of bad faith and constitutes a gross abuse of authority.

...

(viii) The negative and obstructionist attitude of the Respondent has dragged the administration of justice procedure on for nine more months.

..."

Whereas the Respondent filed his answer on 6 August 1996;

Whereas the Applicant filed written observations on 28 August 1996;

Whereas, on 22 October 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, the facts in the case are as follows:

The Applicant entered the service of the United Nations on 13 May 1975, as an Assistant Officer, on a probationary appointment at the P-1, step VI level, in the Executive Office of the Secretary-General (EOSG). On 22 January 1976, the Applicant's appointment was retroactively changed to that of Associate Officer, at the P-2, step I level. On 1 May 1977, she was granted a permanent appointment. On 1 April 1978, the Applicant was promoted to the P-3 level, as Second Officer. On 6 January 1979, she was detailed to UNFICYP in Cyprus. Her functional title was changed to Political Affairs Officer. On 1 July 1979, she was transferred to the Treaty and Resolution Section, Centre for Disarmament, Department of Political and Security Council Affairs. She was promoted to the P-4 level on 1 November 1980, in the Office of the Assistant Secretary-General for Disarmament.

With effect from 1 January 1984, the Applicant was reassigned to the Coordination and World Disarmament Campaign Branch, Department of Disarmament Affairs and, on 1 February 1984, she was outposted from New York to the Geneva Branch.

On 1 February 1985, the Applicant was transferred to the Department of Public Information (DPI), at Headquarters, as Chief of the Non-Governmental Organizations Section, External Relations

Division. With effect from 1 April 1985, she was promoted to the P-5 level. On 15 September 1988, she was reassigned, within DPI, to the Peace and Security Programme Section, Communications and Project Management Division.

The Applicant was temporarily assigned to UNTAG, Namibia from February 1989 through March 1990.

On 1 June 1991, the Applicant was reassigned to the Information Centres Division, DPI, as Director, UN Information Centre (UNIC), Washington, D.C. On 1 December 1991, she was promoted to the D-1 level.

On 21 September 1992, the Under-Secretary-General, DPI, informed the Applicant that the Secretary-General had decided to reassign her to Headquarters, with effect from 31 October 1992, as a result of the "ongoing review process [which] entails movement of staff at Headquarters and the field". He noted that "follow-up discussions concerning your new assignment will take place upon your return".

On 9 October 1992, the Under-Secretary-General, DPI, informed the Applicant that "it was decided by the Secretary-General that you will be reassigned as Director, UNIC, New Delhi". In a note dated 9 October 1992, the Assistant Secretary-General, DPI, indicated that it had been agreed that the Applicant would report for duty in New Delhi by mid-November 1992. In a letter dated 23 December 1992, the Permanent Mission of India to the United Nations informed the Secretary-General that the Government of India had no objection to the Applicant's appointment as Director of the UNIC in New Delhi.

On 1 March 1993, the Applicant's physician informed the Director, Medical and Employee Assistance Division (hereinafter the UN Medical Director) that the Applicant had been under his care since 29 October 1992 and was suffering from a "major depression, single episode, without psychotic features". He attached a report on the Applicant's condition by a clinical psychologist who was also treating the Applicant. He noted that "the traumatic fashion in

which [the Applicant] was informed of her reassignment coupled with the requirement that she wrap up all her personal affairs within a very brief period were major contributing factors in precipitating a severe reactive depression".

On 6 May 1993, the UN Medical Director informed the Assistant Secretary-General, DPI, that the Applicant was "at present not medically fit for an assignment in New Delhi or any similar position. She is still under medical treatment, but should be able to come back to work at Headquarters by the end of the month".

On 7 May 1993, the Assistant Secretary-General, DPI, wrote to the Executive Officer, DPI, stating as follows:

> "I would suggest when [the Applicant] comes back to work on 1 June, you find ways of using her in Headquarters. We will decide then whether to maintain her appointment to New Delhi or not".

In a letter dated 5 June 1993, the Applicant's physician informed the UN Medical Director that the Applicant's recovery was "quite fragile". He noted inter alia: "At this point in [the Applicant's] recovery, a posting to New Delhi is likely to seriously jeopardize her health and result in a return in full force of her depressive illness".

According to the record, the Administration explored the possibility of assigning the Applicant to head the UNIC in Vienna. On 9 September 1993, the UN Medical Director indicated that "there is no medical contraindication in regard to [the Applicant's] transfer to Vienna".

On 15 September 1993, the Applicant sought special leave without pay for one year, from 18 October 1993, to attend Harvard University, pending the resolution by the Respondent of certain administrative problems relating to her transfer to Vienna. In her letter, the Applicant noted that "should the obstacles related to my

posting to Vienna be overcome in the near future, I would be prepared to cut short my participation in the Harvard University Programme".

On 6 October 1993, the Chief of Staff, EOSG, wrote to the Assistant Secretary-General, DPI, indicating that an Information Centre should be opened as soon as possible in Bonn. He noted that the staff member encumbering the post of Director of the UNIC in Vienna should be reassigned to Bonn with effect from 1 November 1993 and "the consequent assignment of [the Applicant] to Vienna should take place immediately thereafter".

On 11 October 1993, the Assistant Secretary-General, DPI, wrote to the Applicant stating that, since arrangements had been finalized with the German Government concerning the Information Centre in Bonn, he authorized her special leave without pay "beginning 18 October, provisionally through 29 October". She was then to report to Headquarters on 1 November and be prepared to report to Vienna on 8 November, to coincide with the departure of the incumbent.

The Applicant reported to Headquarters on 1 November, but returned to Harvard University since arrangements for her assignment to Vienna had not been finalized. Her leave was subsequently extended until 31 August 1994.

On 9 September 1994, the Applicant recorded in a "Note for the Record" that, during conversations that had taken place with the Assistant Secretary-General, DPI, and his Special Assistant concerning her next posting, "it was agreed that it would be a field posting as Head of a United Nations Information Centre, as soon as possible". She stated that she had agreed to a post as Head of the Information Centre in Athens, which had been vacant for some time, "until Vienna is vacated". She also agreed to the timing of such posting, "prior to UN Day 94" in view of the fact "that UNIC Vienna is still not available".

In a Note for the Record dated 14 September 1994, the Assistant Secretary-General, DPI, noted that he had informed the Applicant that "she is being seriously considered to head UNIC Athens in the absence of any other appropriate alternative". He noted: "It is recalled that [the Applicant] had been scheduled to proceed to UNIC Delhi, but declined on medical grounds at the time". In a reply of 22 September 1994, the Applicant confirmed that she was "ready to take on [the Athens] assignment as soon as possible".

On 22 September 1994, the Assistant Secretary-General, DPI, wrote to the Assistant Secretary-General, Office of Human Resources Management (OHRM), as follows: "Although the Medical Director had informed DPI verbally that [the Applicant] could now take up her duties there [in New Delhi], you may wish to confirm whether she should go to New Delhi. If not, we will then have to explore the possibility of sending her to another UNIC, for example, UNIC Athens, where the Director's post is vacant." In a reply dated 24 September 1994, t'e UN Medical Director indicated that "Based on our present information, [the Applicant] is fit to start the proposed assignment."

In a note dated 26 September 1994, the Assistant Secretary-General, DPI, informed the Applicant that, after the Secretary-General's return from New Delhi, he had decided to maintain the post of Head of the Information Centre at the D-1 level. Accordingly, since it had not been possible to place her in a suitable position, "[a]fter consulting with the Chief of Staff, EOSG, and the Director of Personnel, it has been decided that, as the previously selected candidate for the post and the one cleared by the host Government, you should be given another opportunity to move to New Delhi without delay".

By a memorandum dated 28 September 1994, the Applicant asked the Assistant Secretary-General, DPI, to explore other possibilities regarding her placement. She expressed her disappointment over the most recent delay in the finalization of her transfer to Athens,

which was scheduled to be effected "prior to UN Day". She suggested two possible positions at Headquarters for which she would be suitable. She also referred to the "significant stress over the manner in which I was removed from [the Washington UNIC post]". On 28 October 1994, the Assistant Secretary-General, OHRM, requested the Applicant to report for duty in New Delhi no later than the week beginning 7 November. He stated that he had confirmed with the UN Medical Director that she was "considered medically fit for transfer to New Delhi".

On 1 November 1994, the Applicant's treating specialist advised the UN Medical Director against reassigning the Applicant from New York. The UN Medical Director requested the Applicant to submit to another medical exam by a specialist chosen by the UN. The Applicant did so. The report of the second specialist concurred with the report of the Applicant's treating specialist. Accordingly, on 5 December 1994, the UN Medical Director wrote to the Assistant Secretary-General, DPI, advising that the Applicant was not fit for any overseas assignment at the present time. On 6 December 1994, the Assistant Secretary-General, DPI, wrote to the Assistant Secretary-General, OHRM, noting that the Applicant "is not medically fit for any overseas assignment at present" and requesting that "OHRM explore other possible assignments for [the Applicant] within the Secretariat ..." However, by a memorandum to the Applicant dated 29 December 1994, the Assistant Secretary-General, OHRM, informed her that "the Medical Service has thoroughly reviewed the matter and has found that there are no contraindications for your transfer to Athens, Greece. [The Assistant Secretary-General, DPI] is fully supportive ..." The memorandum requested that the Applicant report to Athens on 1 February 1995. On 11 January 1995, the Applicant noted that this decision contradicted the UN Medical Director's opinion that she was not fit for an overseas assignment.

In a memorandum dated 26 January 1995, the Assistant Secretary-General, DPI, asked the Assistant Secretary-General, OHRM,

for his "immediate assistance in identifying for and placing [the Applicant] in an alternative assignment and post at Headquarters outside of DPI. Failing that, I would support any alternative courses of action that can be pursued which OHRM deems appropriate and feasible".

According to the report of the Joint Appeals Board (JAB), on 22 February 1995, the Applicant met with two senior staff members of OHRM, who informed her that her appointment would be terminated for reasons of health under staff regulation 9.1, but that she might wish to consider the alternative of an agreed termination. The Applicant was provided with calculations of her entitlements under the two proposals.

By a letter from the Under-Secretary-General for Administration and Management dated 1 March 1995, the Applicant was terminated under staff regulation 9.1(a) for reasons of health. The Applicant was informed as follows:

> "As you know, since your departure from the United Nations Information Centre in Washington, several suitable positions have been identified for you in a number of countries. However, you were unable to obtain the necessary medical clearance to take up your duties in any of those countries.
>
> Under the circumstances, and since the only positions available were in Europe and Asia, for which you lack medical clearance, the Secretary-General has decided to terminate your appointment under staff regulation 9.1(a) for reasons of health because you have been deemed incapacitated for service in the only posts available and suitable for your qualifications and experience.
>
> You will receive the termination indemnity to which you are entitled in accordance with Annex III to the Staff Regulations and compensation in lieu of notice in accordance with staff rule 109.3(c)."

On 1 March 1995, the Applicant sought a suspension of the administrative decision to separate her from service. Not having

received a negative reply. On 14 April 1995, the Applicant lodged an appeal with the JAB.

The JAB adopted its report on 8 February 1996. Its considerations, conclusion and recommendations read, in part, as follows:

"...

41. The Panel ... noted that, PD/3/80 is intended ... to regulate the procedure for determining whether a staff member is for reasons of health incapacitated for further service and as a result should receive a disability benefit under ... article 33 of the Regulations of the UNJSPF [United Nations Joint Staff Pension Fund]. Such a determination can be made only by the UNJSPC [United Nations Joint Staff Pension Committee] under article 33 of the Pension Fund Regulations. It is that determination which must precede termination by the Secretary-General of an appointment on health grounds.

42. The Panel could not accept the theory that cases of 'first impression' should be dealt with otherwise than in accordance with the Regulations and Rules, including Personnel Directives.

Conclusion

43. ... the Panel found that PD/3/80 was applicable to the case. It could find no support for the distinction between cases of 'total incapacity' and others, particularly as that term did not appear in article 33 of the Pension Fund Regulations. It agreed with Appellant's contention that failure to comply with its provisions was a violation of her rights under the Staff Regulations and Rules and a denial of due process.

Recommendation

44. The Panel unanimously recommends that as Appellant's termination of appointment on health grounds did not conform to the statutory requirements, the Secretary-General should rescind it. He should reinstate the Appellant in the position in which she was at the time of the purported separation. Such reinstatement should automatically restore her rights to health insurance coverage retroactively and to

whatever other entitlements were applicable to her in her status prior to separation, including the right to sick leave in accordance with staff rule 106.2.

45. If the Secretary-General feels, at any time, that the conditions justifying separation on health grounds are present, he should submit the case to the UNJSPC, in accordance with PD/3/80.

46. As regards Appellant's claim for damages, the Panel felt that if its recommendations are carried out, the Appellant will have received full restitution of her rights. It therefore does not make any recommendation for the award of damages at this time."

On 27 March 1996, the Applicant filed with the Tribunal the application referred to above.

On 3 June 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised her as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the conclusions of the Panel regarding personnel directive PD/3/80 and its relevance to your case and to your rights. He has further noted the Panel's recommendation that the decision to terminate your appointment should be rescinded and that you should be reinstated with retroactive rights. He has also noted the Panel's comments regarding the submission of your case to the U.N. Joint Staff Pension Committee and that the Panel made no recommendation in favour of an award of damages to you at this time.

The Secretary-General has given careful consideration to these conclusions and recommendations. He has also noted that, in the final consideration of the Panel's report, the Panel did not refer to the difficult position in which the Administration was placed by your health situation or to the Administration's efforts to find a new posting for you and to accommodate your health situation in this search. The fact remains that your health situation, the need for a 'stress free' position at the D-1 level at Headquarters in New York, and the failure to find such a position, was the factor which led to the decision to terminate your appointment.

The Secretary-General has decided to maintain the contested decision to terminate your appointment, and to take no further action in your case. The factor leading to your termination stated above is now reinforced as the current early separation and redeployment exercise at the United Nations makes it even more unlikely that a 'stress free' D-1 position could be found for you at Headquarters.

In regard to the submission of your case to the United Nations Joint Staff Pension Committee, the Secretary-General notes that under Section H.4 of the Administrative Rules of the United Nations Joint Staff Pension Fund you have a right to request a disability benefit and that Section K of those Rules contains procedures for resolution of disputes as to your state of health."

Whereas the Applicant's principal contentions are:

1. The Secretary-General's decision to terminate the Applicant's contract was in violation of the letter and spirit of staff regulation 9.1(a) as well as in clear violation of personnel directive 3/80 and article 33(a) of the UNJSPF Regulations.

2. The Secretary-General's decision to terminate her permanent appointment on the ground of incapacity for further service by reasons of health was without basis and totally invalid.

Whereas the Respondent's principal contentions are:

1. As the Applicant was medically fit only for assignments to "stress free" jobs located only in New York - and no such jobs are available - the Applicant was properly separated on 1 March 1995.

2. The crux of the case therefore is the medical condition of the Applicant, which can be determined only if she makes an application to the United Nations Joint Staff Pension Committee for a disability benefit.

The Tribunal, having deliberated from 21 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Secretary-General dated 3 June 1996, rejecting the recommendation of the Joint Appeals Board that "as Appellant's termination of appointment on health grounds did not conform to the statutory requirements, the Secretary-General should rescind it. He should reinstate the Appellant in the position in which she was at the time of the purported separation."

Staff regulation 9.1(a), under which the Respondent purported to terminate the Applicant's appointment, provides that "the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment and whose probationary period has been completed, if the necessities of the service require abolition of the post or reduction of staff, if the services of the individual concerned prove unsatisfactory, or if he or she is, for reasons of health, incapacitated for further service".

The letter of 1 March 1995, which gave notice of termination, informed the Applicant that she would receive a termination indemnity in accordance with Annex III of the Staff Regulations, and compensation in lieu of notice in accordance with staff rule 109.3(c).

The Applicant seeks rescission of the decision to terminate her appointment, and claims that the decision was in violation of the letter and spirit of staff regulation 9.1(a) and in clear violation of personnel directive 3/80 and article 33(a) of the United Nations Joint Staff Pension Fund (UNJSPF) Regulations.

II. Paragraph 4 of personnel directive 3/80 provides " When the Medical Director, subject to paragraph 5, has reached the conclusion that the staff member's illness constitutes an impairment to health which is likely to be permanent or of long duration, he will so advise the Personnel Officer who will immediately prepare an appropriate presentation to the United Nations Joint Staff Pension Committee ..." Paragraph 6 of personnel directive 3/80 provides

"[t]he action of the United Nations Joint Staff Pension Committee is governed by the UNJSPF Regulations and Rules. Following consideration of the presentation of the Personnel Officer and the advice of the Medical Director, the Committee will determine whether or not the staff member is incapacitated within the meaning of article 34(a) of the UNJSPF Regulations. The Committee will advise both the staff member and the Personnel Officer concerned of its determination".

The Respondent did not forward the Applicant's case to the United Nations Joint Staff Pension Committee (UNJSPC), because in his view, the terms of the UN Medical Director's opinion made it difficult to conclude that the Applicant was incapacitated for further service reasonably compatible with her abilities in a Member Organization (article 33(a) of the UNJSPF Regulations).

The Respondent's contention, that the Organization did not submit the Applicant's case to the UNJSPC because the Medical Director's opinion made it difficult to conclude that the Applicant was incapacitated for further service reasonably compatible with her abilities in a Member Organization, seems to the Tribunal to call into question the validity of the Respondent's termination of the Applicant's service on health grounds. Although the Respondent seeks to introduce the element of failure to find a suitable position as a reason for termination, the fact remains that the purported termination was on health grounds under staff regulation 9.1(a). Given this premise, there is no validity in the Respondent's argument that the matter was not referred to the UNJSPC because, in effect, the Medical Director's opinion might not substantiate incapacity. Nor is there validity in the contention that failure to find a suitable position was the basis of the termination.

III. The Respondent further argues that the Applicant could have referred the matter herself to the UNJSPC and sought a determination

that she was entitled to a disability benefit if the UN did not send such a request to the UNJSPC.

Paragraph H.4 of the Administrative Rules of the UNJSPF provides that a determination under article 33(a) shall be made by the staff pension committee at the request of a participant:

> "(a) Whenever the organization has not acted in accordance with rule H.3 above; or
>
> (b) Whenever a participant alleges that on the date of separation he was incapacitated within the meaning of article 33(a)."

These provisions would have placed an obligation on the Applicant to request a determination, inter alia, if she was of the view that she was incapable of work. This, clearly, was not her view. On the contrary, her position was that she could have continued in the service of the Organization. She was not obliged to seek a determination.

IV. The Respondent challenges the status of the Personnel Directive, contending that it is not, stricto sensu, a legislative instrument, but a directive to Personnel Officers, setting out, for guidance purposes, the general procedures that should be followed in given circumstances. The Tribunal does not accept the Respondent's contention that this Personnel Directive has no bearing on the case.

The purpose of the Personnel Directive is, indeed, to give guidance regarding personnel policies and procedures to be followed in the application of the Staff Regulations and Rules. The Tribunal is of the view that the Personnel Directive was brought into being for a particular purpose and cannot be ignored. The Personnel Directive and the Rules and Regulations are interrelated, and must be applied in conjunction with each other.

V. The Respondent asks that the Tribunal find that, as the Applicant has sought compensation measured by reference to her entitlement to a disability benefit, she must first apply for a disability benefit and obtain a final decision on that request, prior to having the Tribunal rule on her entitlement to compensation based on such disability benefit. The Respondent regards this case as premature and, therefore, believes that it should be dismissed, or alternatively, that the case be remanded until a decision is made on the Applicant's right to a disability benefit.

A request to the Tribunal for compensation measured by reference to disability benefits must be preceded by a denial of those benefits. The Applicant, following treatment, is now in good health. Therefore, the Respondent's contention fails on practical grounds. It is also unacceptable that the Respondent should select a mere section of the Applicant's claim and seek, on that basis, to preclude a hearing of the appeal by the Tribunal.

VI. The Respondent failed to observe proper procedures and, in so doing, denied the Applicant due process. The Applicant, who had a distinguished record of service and who was having some difficulties with her health, was subjected to distressing and unwarranted treatment at the hands of the Organization.

VII. For the foregoing reasons, the Tribunal:

1. Finds in favour of the Applicant and orders the rescission of the decision of the Respondent, dated 3 June 1996, to terminate the Applicant's permanent appointment;

2. Orders that the Applicant be reinstated in a position with the same grade and at the same step which she held when she was separated, with full payment of salary and emoluments from the date of her separation from service, less her earnings from other employment, if any;

3. Should the Secretary-General, within 30 days of the notification of this judgement decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in her case, the Tribunal fixes the compensation to be paid to the Applicant at three years of her net base salary.

In so doing, the Tribunal finds, in accordance with article 9 of its Statute, that this case is exceptional, for the reasons stated above, namely that the Respondent, when terminating the appointment, failed to observe the procedures set forth in the Staff Rules and Regulations and denied the Applicant due process. The Respondent failed to follow the procedures laid down for dealing with separations on health grounds, despite repeated requests by the Applicant that he should do so. The Applicant was left, for an unconscionably long period of time, without financial resources from either the Organization or the Pension Fund, thus causing excessive hardship to the Applicant.

VIII. All other pleas are rejected.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary